

ORIGINAL

(S E R V E D)
(August 1, 2000)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

August 1, 2000

DOCKET NO. 99-20

**GSTAAD, INC. AND SERGIO LEMME
POSSIBLE VIOLATIONS OF SECTION 10(a)(1)
OF THE SHIPPING ACT OF 1984**

**PROPOSED SETTLEMENT APPROVED,
SERGIO LEMME DISMISSED AS A RESPONDENT,
AND INVESTIGATION DISCONTINUED**

Respondent Gstaad, Inc. ("Gstaad" or "respondent") and the Bureau of Enforcement ("BOE") have submitted a joint memorandum in support of a proposed settlement in this proceeding and a motion to dismiss Sergio Lemme as a respondent. The parties believe that the proposed settlement meets the Commission's criteria for approval of agreements resolving administrative enforcement claims and, therefore, should be approved, and also that the motion to dismiss should be granted.

Introduction

By Order of Investigation dated October 21, 1999, the Commission commenced an investigation to determine whether Gstaad and Sergio Lemme, Gstaad's chief administrative and operational officer, violated section 10(a)(1) of the Shipping Act of 1984 ("1984 Act") by obtaining or attempting to obtain transportation at less than the rates and charges otherwise applicable by an unjust or unfair device or means; whether, in the event violations of section 10(a)(1) of the 1984 Act are found, civil penalties should be assessed against Gstaad and, if so, the amount of penalties to be assessed; whether the tariffs of Gstaad should be canceled or suspended; whether the Commission should revoke Gstaad's license to operate as an Ocean Transportation Intermediary; and whether an appropriate cease and desist order should be issued.

BOE avers that at the evidentiary hearings it would introduce evidence in support of the allegations set forth in the Order of Investigation; that it would show, through testimonial and documentary evidence that by virtue of arrangements made and implemented by Sergio Lemme, Gstaad received unlawful rebate payments on hundreds of shipments during 1997 and 1998; and that it would proffer evidence to show that Gstaad misused its service contracts thereby allowing other shippers to obtain less than applicable transportation rates, for which it received additional compensation from shippers and rebates from carriers.

Respondent, Gstaad, admits the violations alleged.

Gstaad and BOE believe it is in the best interests of the parties and the shipping public to resolve the proceeding rather than engage in further litigation. In furtherance thereof, respondents

have requested, and BOE has agreed to support, dismissal of Sergio Lemme as a respondent in this proceeding.

The attached settlement agreement is the result of negotiations between counsel for respondents and BOE and reflects each party's view of the case and its fair resolution. Upon approval of the proposed settlement by the presiding administrative Law Judge and the Commission, the parties seek grant of the motion to dismiss Sergio Lemme as a respondent and discontinue this investigation.

Authority for Settlement

The Administrative Procedure Act ("APA"), 5 U.S.C. §554(c)(1), requires agencies to give interested parties an opportunity, *inter alia*, to submit offers of settlement "when time, the nature of the proceeding, and the public interest permit." As the legislative history of the APA makes clear, Congress intended this particular provision to be read broadly so as to encourage the use of settlement in proceedings such as the present one:

. . . even where formal hearing and decision procedures are available to parties, the agencies and the parties are authorized to undertake the informal settlement of cases in whole or in part before undertaking the more formal hearing procedure. Even courts through pretrial proceedings dispose of much of their business in that fashion. There is much more reason to do so in the administrative process, for informal procedures constitute the vast bulk of administrative adjudication. . . . The statutory recognition of such informal methods should strengthen the administrative arm and serve to advise private parties that they may legitimately attempt to dispose of cases at least in part through conferences, agreements, or stipulations.

Senate Committee on the Judiciary, Administrative Procedure Act-Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. 24 (1946).

Courts have endorsed the use of the APA settlement provision “to eliminate the need for often costly and lengthy formal hearings in those cases where the parties are able to reach a result of their own which the appropriate agency finds compatible with the public interest.” *Pennsylvania Gas and Water v. Federal Power Commission*, 463 F.2d 1242, 1247 (D.C. Cir. 1972).

The Commission itself has long recognized that the law strongly favors settlements:

. . . the law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy. . . . The resolution of controversies by means of compromise and settlement is generally faster and less expensive than litigation; it results in a saving of time for the parties, the lawyers, and the courts and it is thus advantageous to judicial administration, and, in turn, to government as a whole.

Old Ben Coal Company v. Sea-Land Service, Inc., 21 F.M.C. 506,512 (1978), 18 S.R.R. 1085, 1092 (Initial Decision, 1978; administratively final November 29, 1978). See also *Del Monte Corp. v. Matson Navigation Co.*, 22 F.M.C. 365,368-g (1979), 19 S.R.R. 1037, 1039 (Initial Decision, 1979; administratively final December 27, 1979); and *Behring International Inc.* (Initial Decision, March 17, 1981; administratively final June 30, 1981), 20 S.R.R. 1025, 1032-33.

Rule 91 of the Commission’s Rules of Practice and Procedure, 46 C.F.R. §502.91, codifies the *Old Ben Coal* holding in language borrowed in part from the APA, 5 U.S.C. § 554(c)(1). In accordance with Rule 91 and its policy favoring settlements, the Commission has approved settlements of administrative and investigative proceedings. *Eastern Forwarding International, Inc.*

(Initial Decision, July 30, 1980; administratively final September 8, 1980), 20 S.R.R. 283, 286 (“*Eastern*”); *Far Eastern Shipping Co.* (Initial Decision, March 25, 1982; administratively final, May 7, 1982), 21 S.R.R. 743, 764 (“*FESCO*”); *Armada Great Lakes/East Africa Service, Ltd.* (Initial Decision, March 21, 1986; administratively final April 25, 1986), 23 S.R.R. 946, 949 (“*Armada*”); *TWRA—Possible Violations of the Shipping Act of 1984* (Initial Decision, August 27, 1986; administratively final October 9, 1986), 23 S.R.R. 1329, 1340 (“*TWRA*”); and *Royal Caribbean Cruises Ltd. Possible Violations of Certification Requirements* (Order Approving Settlement and Discontinuing Proceeding, December 4, 1991), 26 S.R.R. 64 (“*Royal Caribbean*”).

The Commission’s regulations recognize the designated role of BOE in formal proceedings and, necessarily, in the settlement of those proceedings. 46 C.F.R. §§ 502.42 and 502.61. The regulations also require that the Presiding Judge approve all such settlement agreements in formal proceedings. 46 C.F.R. § 502.603(a).

Criteria for Approval of Settlement

To discharge the duty imposed by 46 C.F.R. § 502.603(a), the Presiding Judge must decide whether the proposed settlement satisfies appropriate criteria for approval. Among the criteria to be considered in evaluating settlement offers are the Commission’s enforcement policy, litigative probabilities and litigative and administrative costs.

A summary of the Commission’s view of the relationship between the criteria for assessment of penalties and the criteria for approving settlements appears in the initial decision in *Armada*:

As seen, Section 13(c) of the 1984 Act and § 505.3 of the Commission's regulations, which implements both Section 13 of the 1984 Act and Section 32 of the 1916 Act, explicitly set forth criteria for assessment of penalties, and while they do not directly address the criteria for settlement of penalties, I believe the latter are subsumed by the former. This is manifest from the history of the settlement process at the Commission. Section 32(e) of the 1916 Act was enacted in 1977. [Footnote omitted.] The rules and regulations implementing Section 32(e) were promulgated and published by the Commission in a predecessor version of 46 CFR § 505, in 1979. Under those rules the "criteria for compromise, settlement or assessment" might "include but need not be limited to those which are set forth in 4 CFR Parts 101-105." . . . Those standards, particularly, the standards enumerated in 4 CFR § 103, were a part of the Commission's program for settlement and collection of civil penalties even before the authority to assess penalties was given the Commission pursuant to Section 32(e). More to the point, it was held that those standards provided criteria for both settlements and assessments. "They continue to provide valuable assistance to the Commission as an aid in determining the amount of penalty in assessment proceedings and in determining whether to approve proposed settlements in assessment proceedings." [citing *Eastern and Behring International, Inc.*, *supra*.]

Armada, *supra*, 23 S.R.R. at 956. See also *Marcella Shipping Co. Ltd.* (Initial Decision, February 13, 1986; administratively final March 26, 1986), 23 S.R.R. 857,866.

The appropriate standards for approving proposed settlements in assessment proceedings were summarized in *FESCO* as follows:

. . . settlement may be based upon a determination that the agency's "enforcement policy in terms of deterrence and securing compliance, both present and future, will be adequately served by acceptance of the sum to be agreed upon"; that "the amount accepted in compromise . . . may reflect an appropriate discount for the administrative and litigative costs of collection having regard for the time it will take to effect collection"; the value of settling claims on the basis of pragmatic litigative probabilities, i.e., the ability to prove a case for the full amount claimed either because of legal issues involved or a bona fide dispute as to facts; and that penalties may be settled "for one or for more than one of the reasons authorized in this part." [Footnotes omitted.]

FESCO, *supra*, 21 S.R.R. at 759.

The Commission has reaffirmed that potential costs and uncertainties of success are valid factors to be considered both in negotiation of settlement and in view of a settlement agreement. *Investigation of Unfiled Agreements-Yangming Marine Transport, et al.* (Order Adopting Initial Decision, March 30, 1988), 24 S.R.R. 910 (“Yangming”). See also *Royal Caribbean, supra*.

In line with the Commission’s analysis as enunciated in *FESCO, Eastern, Armada, Yangming*, and *Royal Caribbean, supra*, proposed settlements are to be evaluated on the basis of balancing agency enforcement policy of deterrence by respondent, the industry and the general public with the litigative probabilities, litigative and administrative costs and such other matters as justice may require. One such factor which BOE has considered is the relative size and financial condition of Gstaad and respondents’ ability to pay a civil penalty. Both Gstaad and Sergio Lemme presented credible documentation as to the extent of their ability to pay a civil penalty. The balance discussed in the cases cited clearly favors approval of this proposed settlement.

With respect to the policy of enforcement, BOE stresses the importance of ensuring compliance by Ocean Transportation Intermediaries and all regulated entities with the Shipping Acts and the Commission’s regulations. Respondents support the Commission’s objectives and acknowledge BOE’s case against Gstaad. Gstaad has agreed to pay \$150,000, to cancel its NVOCC tariffs and bond, to relinquish its license to operate as an Ocean Transportation Intermediary and to terminate its participation in ocean transportation. In addition to the impact on these respondents, the settlement should have a deterrent effect on the industry as a whole. Accordingly, the parties submit that the proposed settlement agreement will further the Commission’s enforcement policy.

As noted above, there are bona fide disagreements between respondents and BOE as to certain facts and legal issues. Although each party is confident it would prevail, the outcome of any

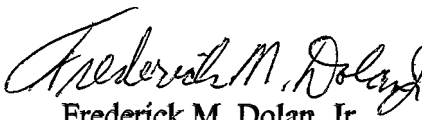
litigation is uncertain. In view of the litigative probabilities, the parties seek a settlement of this proceeding. Inasmuch as this proceeding could be complicated, time consuming, and costly, the proposed settlement would save all parties time and expense. Therefore, it is abundantly clear that the litigative probabilities and potential litigative and administrative costs of this proceeding favor approval of this proposed settlement agreement and dismissal of Sergio Lemme as a respondent.

Conclusion

The proposed settlement agreement comprehensively addresses the issues relating to the above-referenced proceeding and meets the Commission's well established criteria for approval of agreements settling administrative enforcement claims and, therefore, will be approved, Sergio Lemme will be dismissed as a respondent, and this proceeding will be discontinued.

IT IS ORDERED:

The attached settlement agreement is approved, Sergio Lemme is dismissed with prejudice as a respondent in this proceeding, and the investigation is discontinued.


Frederick M. Dolan, Jr.
Administrative Law Judge

**BEFORE THE
FEDERAL MARITIME COMMISSION**

GSTAAD, INC. AND SERGIO LEMME

POSSIBLE VIOLATIONS OF SECTIONS 10(A)(1)

OF THE SHIPPING ACT OF 1984

Docket No. 99-20

SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT (the "Agreement") is entered into between:

- 1) the Federal Maritime Commission's ("Commission") Bureau of Enforcement ("BOE"),
- and
- 2) Gstaad, Inc., the corporate Respondent in Docket No. 99-20, hereinafter "Gstaad" or "Respondent".

WHEREAS, the Bureau of Enforcement believes that:

1. During 1997 and 1998, Gstaad knowingly and willfully obtained transportation for less than the applicable tariff or service- contract rates from ocean carriers on shipments to South America through the device or means of receiving unlawful rebates and other freight rate concessions; and

2. Gstaad knowingly and willfully allowed other shippers to make shipments under Gstaad service contracts and thereby to obtain lower than applicable service contract rates, even though Gstaad performed no transportation function nor assumed any NVOCC obligation with respect to those shipments.

WHEREAS, the Commission acted upon such alleged violations by instituting FMC Docket No.99-20, to which Gstaad and Sergio Lemme, Gstaad's chief administrative and operational officer, have been named Respondents, in order to determine whether the Respondents violated section 1 O(a)(1) of the Shipping Act of 1984; whether, in the event such violations are found, civil penalties should be assessed; whether the tariffs of Gstaad should be canceled or suspended; whether its license to operate as an Ocean Transportation Intermediary ("OTI") should be revoked, and whether an appropriate cease and desist order should be issued;

WHEREAS, Gstaad admits the violations alleged in the Commission's Order of Investigation and has agreed to cancel its NVOCC tariffs and bond, to relinquish its OTI license and to cease and desist from further activities in ocean transportation;

WHEREAS, Respondents have requested, and BOE has agreed to support, dismissal of Sergio Lemme as a Respondent in FMC Docket No. 99-20;

WHEREAS, the Bureau of Enforcement and Respondent believe it is in the best interests of the parties and the shipping public to resolve the above referenced proceeding rather than engage in further litigation; and

WHEREAS, Respondent has terminated the practices which are the basis for the alleged violations set forth herein.

NOW, THEREFORE, in consideration of the premises herein, and in compromise of all civil penalties arising from the alleged violations set forth and described herein, Respondent, Gstaad, and the Commission's Bureau of Enforcement hereby agree upon the following terms of settlement:

1. Upon approval of this Settlement Agreement by the Administrative Law Judge, Respondent shall make a monetary payment to an interest bearing escrow account, in the total amount of \$150,000 (One Hundred and Fifty Thousand Dollars), for the benefit of the Federal Maritime Commission. On that day, Respondent shall provide written verification to the Commission that the total monetary payment of \$150,000 was placed in such interest bearing account in accordance with this Agreement.
2. No later than twenty-five (25) days after approval of this Settlement Agreement by the Administrative Law Judge, the \$150,000 shall be paid from such interest bearing escrow account to the Commission, together with any interest accruing thereon;
3. Upon the approval by the Administrative Law Judge of this Settlement Agreement becoming administratively final, Gstaad shall cancel any and all tariffs and NVOCC bonds, shall relinquish to the Commission its OTI license and shall terminate all activities in ocean transportation;

4. This Agreement shall forever bar the commencement or institution by the Commission of any civil penalty assessment proceeding or other claim for recover of civil penalties against Gstaad or its officers, directors, employees and successors.
5. Upon approval of this Settlement Agreement by the Commission, FMC Docket No. 99-20 shall be discontinued.
6. This Agreement shall become effective upon approval by the Commission in accordance with 46 C.F.R. 502.603 (a).

**ON BEHALF OF RESPONDENT
GSTAAD, INC.**

By: /s/ Sergio Lemme

Title: President

Date: 10 JUL 00

ON BEHALF OF THE FEDERAL MARITIME COMMISSION

By: /s/ Vem W. Hill

Vem W. Hill, Director

Bureau of Enforcement

Subject to Approval by the Commission in accordance with paragraph 6 hereof.

Date: 26 July 2000